SUPREME COURT, U. S.

JUN 14 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 202

LEE RUBBER & TIRE CORPORATION,
Petitioner,

v.

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 102, AN UNINCORPORATED ASSOCIATION, and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 227, AN UNINCORPORATED ASSOCIATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

EDWIN P. ROME,
M. KALMAN GITOMER,
GONCER M. KRESTAL,
RICHARD A. SEMARARO,
4 Penn Center Plaza,
Philadelphia, Pa. 19103
Attorneys for Petitioner, Lee Rubber & Tire Corporation.

BLANK, RUDENKO, KLAUS & ROME,
YAUCH & FAGAN,
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR ALLOWING WRIT	10
A. The Court of Appeals Exceeded the Guidelines of Arbitrability Established by This Court in United Steelworkers v. Warrior & Gulf Navigation Co.	11
B. The Principles of Arbitrability Established in United Steelworkers v. Warrior & Gulf Navigation Co. Are Not Applicable	15
C. The District Court Did Not Have Subject Matter Jurisdiction of This Action Under Section 301	17
APPENDIX A:	
Opinion of the United States District Court for the District of New Jersey	A-1
Judgment	A-15
Order Granting Stay of Judgment Pending Appeal	A-17
APPENDIX B:	
Opinion of the United States Court of Appeals for the Third Circuit	A-18

TABLE OF CITATIONS.

Cases: Page

Denver & R. G. W. R. R. v. Brotherhood of Railroad Trainmen, 387 U. S. 556 (1967) 18

Dixie Carriers, Inc. v. National Maritime Union, 35 F. R. D. 365 (S. D. Tex. 1964) 18, 19

United States v. Moorman, 338 U. S. 457 (1950) 15, 17

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U. S. 574 (1960) 10, 11, 13, 14, 15, 16, 17

Statutes: Page

Labor-Management Relations Act:

Section 301, 29 U. S. C. § 185 ..... 3, 4, 11, 17, 19

Section 301(a), 29 U. S. C. § 185(a) 3, 19

Section 301(c), 29 U. S. C. § 185(c) 3, 18, 19

28 U. S. C. § 1254(1) 2

28 U. S. C. § 1331 4

28 U. S. C. § 1337 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

LEE RUBBER & TIRE CORPORATION,
Petitioner,

v.

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 102, AN UNINCORPORATED ASSOCIATION, AND UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 227, AN UNINCORPORATED ASSOCIATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Lee Rubber & Tire Corporation, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit, which is not yet reported, is printed in Appendix A to this Petition. The opinion and judgment of the United States District Court of the District of New

Jersey is reported at 269 F. Supp. 708 and is printed in Appendix B to this Petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 1, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Whether provisions in separate self-contained welfare agreements between petitioner-employer and respondent-unions which provide for the arbitration of specific issues only and incorporate the grievance and arbitration procedure of the general collective bargaining agreements between the same parties to resolve disputes involving some of these specific issues incorporate, by rule of law, the broad scope of the grievance and arbitration clauses of the general collective bargaining agreements so as to make the disputes raised herein which were not so specified subject to arbitration?

2. Whether provisions for arbitration contained in separate self-contained welfare agreements between petitioner-employer and respondent-unions which are conditioned on the existence of general collective bargaining agreements between the parties are binding after the expiration of the general collective bargaining agreements?

3. Whether the rules of construction applicable to ordinary commercial contracts, rather than the rules applicable to collective bargaining agreements, should be utilized in determining whether separate self-contained welfare agreements between petitioner-employer and respondent-unions provide for the arbitration of the issues which respondents seek to arbitrate?

4. Whether the District Court had jurisdiction over the subject matter of this action under Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185, since the action was not brought in the district in which respondent-unions maintain their principal offices or are engaged in representing or acting for employee members as required by Subsections 301(a) and (c)?

STATUTES INVOLVED.

Subsections 301(a) and (c) of the Labor-Management Relations Act, 29 U. S. C. § 185 (a), (c) provide as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."
>
> "(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

STATEMENT OF THE CASE.

This is an action commenced by two unions, Local 102 and Local 227, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO ("Local 102" and "Local 227" respectively), in the United States District Court for

the District of New Jersey (Rec. 4) [1] to compel Lee Rubber & Tire Corporation ("Company") to submit certain grievances to arbitration.[2] The grievances in dispute concern the eligibility of striking employees for coverage under welfare agreements between the Company on the one part and each of the local unions on the other part. Jurisdiction was alleged under Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185, and under 28 U. S. C. §§ 1331 and 1337.

Company denied that the grievances were arbitrable or that the District Court had jurisdiction over the subject matter of this action (Rec. 187) and these questions were submitted to the District Court on cross motions for summary judgment (Rec. 192, 194) and on the basis of a detailed stipulation of fact (Rec. 25). The Court granted the unions' motion and entered judgment compelling Company to arbitrate (App. A).[3] This judgment was affirmed by the United States Court of Appeals for the Third Circuit (App. B).

The facts pertaining to the questions raised herein are as follows:

Company operated two plants, one in Youngstown, Ohio, known as Republic Rubber Division (Rec. 25, par. 2), and one in Conshohocken, Pennsylvania (Rec. 27, par. 13). In connection with its operations at these plants, Company had entered into collective bargaining agreements with Local 102 (Rec. 26, par. 4; 31) and Local 227 (Rec. 28, par. 15; 98). The agreement with Local 102 covered certain employees at the Republic Rubber Division plant and the agreement with Local 227 covered certain employees at the

---

1. All references to "Rec." are to the Appellant's printed Appendix in the United States Court of Appeals for the Third Circuit, a certified copy of which has been filed in this Court.

2. By amended complaint, unions sought the alternative relief of damages for breach of contract (Rec. 184).

3. All references to "App." are to the Appendices to this Petition.

Conshohocken plant. Both labor agreements were scheduled to expire on June 30, 1963 (Rec. 26, par. 6; 28, par. 17).

Company had further entered into a separate agreement with Local 102 entitled "Employee Welfare Benefit Programs—Republic Rubber Division" (Rec. 26, par. 5; 37), and a separate agreement with Local 227 entitled "Agreement for Pension, Service Award and Insurance Benefits" (Rec. 28, par. 16; 103) ("Welfare Agreements"), both effective July 1, 1961 to June 30, 1966. These agreements consist of separate parts each relating to different welfare benefits; i.e., pension,[4] service awards,[5] insurance[6] (life, disability, hospitalization, surgical-medical, accident and sickness) and supplemental workmen's compensation.[7]

The labor agreements with Locals 102 and 227 contain grievance and arbitration clauses which provide machinery for resolving disputes arising under the contracts (Rec. 31, 98). The welfare agreements on the other hand, do not contain general arbitration provisions. Rather, there are six separate arbitration clauses of limited scope in each agreement. Each of these clauses is applicable to only one of the types of benefits referred to above and provide for arbitration of only one specific matter relating to that benefit. It was agreed that some, but not all, of the six matters subject to grievance and arbitration would be processed in accordance with the procedure for handling grievances set forth in the labor agreements. The matters subject to arbitration and the agreed upon method of resolving disputes in each welfare agreement are as follows:

---

4. Republic Welfare Agreement, Part I (Rec. 43); Conshohocken Welfare Agreement, Article I (Rec. 110).

5. Republic Welfare Agreement, Part II (Rec. 63); Conshohocken Welfare Agreement, Article II (Rec. 134).

6. Republic Welfare Agreement, Parts III-VI (Rec. 67); Conshohocken Welfare Agreement, Article III (Rec. 139).

7. Republic Welfare Agreement, Part V, Section II, paragraph 7 (Rec. 82); Conshohocken Welfare Agreement, Article IV (Rec. 155).

REPUBLIC WELFARE AGREEMENT

Benefit	*Specific Issue to Be Resolved*	*Method*	*Provision in Welfare Agreement*
Pension	Permanent incapacity.	Physicians selected by Company and Union.	Part I, Art. II, Sec. 3.02, Rec. 46
Insurance Program: Life Insurance, Disability, Hospitalization, Surgical-Medical, Accident and Sickness	Disability.	Physicians selected by Company and Employee.	Part VI, par. 2.02, Rec. 86
Pension	Eligibility for and computation of benefits.	Grievance procedure under any applicable collective bargaining agreement.	Part I, Art. VII, Sec. 4, Rec. 62
Service Awards	Qualifications of employee to transfer to or ability to meet requirements of another job.	Grievance procedure of the collective bargaining agreement or a grievance procedure similar thereto.	Part II, par. 3.01, Rec. 64
Insurance Program	Whether Company's contract with an insurance company provides the coverage agreed to, thereby relieving Company of individual liability.	Grievance procedure of the collective bargaining agreement.	Part V, Sec. I, par. 10.01, Rec. 81-82
Supplemental Workmen's Compensation	Any difference between Company and employee applicant for supplemental Workmen's Compensation with respect to such benefits.	Grievance procedure of the collective bargaining agreement with limitations.	Part V, Sec. II, par. 7, Rec. 84-85

CONSHOHOCKEN WELFARE AGREEMENT

Benefit	*Specific Issue to Be Resolved*	*Method*	*Provision in Welfare Agreement*
Pension	Permanent incapacity.	Physicians selected by Company and Union.	Art. I, Sec. VI, par. 2, Rec. 131
Insurance Program: Hospitalization, Surgical-Medical, Health and Accident	Disability.	Physicians selected by Company and Union.	Art. III, Sec. 1, par. F, Rec. 148
Pension	Eligibility for and computation of benefits.	Grievance procedure in the collective bargaining agreement.	Art. I, Sec. VI, par. 1, Rec. 130-31
Service Awards	Qualifications of employee to transfer to or ability to meet requirements of another job.	Grievance procedure of the collective bargaining agreement.	Art. II, Sec. II, par. 2, Rec. 135
Insurance Program	Whether Company's contract with an insurance company provides the coverage agreed to, thereby relieving the Company of individual liability.	Grievance procedure of the collective bargaining agreement then in effect.	Art. III, Sec. III, par. F, Rec. 154-55
Supplemental Workmen's Compensation	Any difference between Company and employee applicant for supplemental workmen's compensation with respect to such benefits.	Grievance procedure of the collective bargaining agreement.	Art. IV, par. G, Rec. 157-58

After the two collective bargaining contracts expired on June 30, 1963, the employees represented by Locals 102 and 227 commenced a strike at each of the Company's two plants (Rec. 26, par. 6; 28, par. 17). Company, having been advised that only active employees were eligible for coverage for benefits under the welfare agreements, thereupon notified Locals 102 and 227 that, during the pendency of the strike, it would discontinue payment of premiums with respect to the life insurance, hospitalization, sickness and accident, and supplemental workmen's compensation [8] benefits for which provision had been made under the welfare agreements, said discontinuance to be effective September 30, 1963 (Rec. 26, par. 7; 29, par. 20; 90; 167). Locals 102 and 227 challenged the Company's right to terminate such payments by filing grievances under those provisions [9] which provide for the use of the grievance procedure of the collective bargaining contracts for the determination of disputes as to whether Company had provided the required insurance benefits through an insurance carrier (Rec. 26, par. 8; 29, par. 22; 93; 173). These grievances were rejected by Company on the basis that the grievance procedures of the expired collective bargaining contracts were no longer in effect and that the disputes, which concerned the

---

8. Although the supplemental workmen's compensation benefits were terminated at the same time as the insurance coverage, Company continued to pay these benefits, as well as the sickness and accident benefits, to employees who became entitled to same prior to the strike (Rec. 95, 176). These benefits which reimburse employees for lost earnings, by their very nature, require an existing employment relationship and no new claims could arise with respect thereto subsequent to the strike. Insofar as the demands made by the unions for arbitration pertain to these benefits, therefore, they are moot.

9. Republic Welfare Agreement, Part V, Section 1, paragraph 10.01 (Rec. 81-82); Conshohocken Welfare Agreement, Article III, Section III, paragraph F (Rec. 154-55).

eligibility of striking employees for insurance benefits were not covered by these or any of the other grievance and arbitration procedures of the welfare agreements (Rec. 26, par. 9; 29, par. 23; 95; 176). The instant action to compel arbitration followed.

As noted above, Company denied that the grievances were arbitrable and that the Court had jurisdiction over the matter under Section 301 of the Labor-Management Relations Act. In this regard, the District Court found that the local unions neither maintained their principal offices nor engaged in representing or acting for employee members in the district as required under Section 301(c). Nonetheless, the Court decided that the requirements of Section 301(c) relate solely to venue, not to subject matter jurisdiction, and that the Company had waived its rights to the defense of lack of venue by failing to raise it seasonably. The Court further concluded that the limited reference in the insurance provisions of the welfare agreements to the arbitration provisions of the labor agreements for the settlement of the specific dispute whether Company had provided the benefits required thereunder through an insurance carrier constituted, as a matter of law, a general adoption of the substantive arbitration procedures of the labor agreements for the settlement of other disputes arising under the insurance provisions without regard to the express limitations thereof. The Court of Appeals affirmed, specifically holding that the District Court did have subject matter jurisdiction over the action, despite the lack of conformity with the requirements of Section 301, and that the disputes between the parties relating to eligibility of strikers for insurance benefits were arbitrable despite the limited nature of the arbitration clauses of the insurance provisions of the welfare agreement.

REASONS FOR ALLOWING WRIT.

Certiorari should be granted to review the decision of the United States Court of Appeals for the Third Circuit in the instant action because:

1. The decision of the Court of Appeals holding the disputes between the parties arbitrable contrary to the express language and intent of the welfare agreements constituted an erroneous extension of the principles of arbitrability established by this Court in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), not heretofore made by any other federal court and involves an important question of federal labor law which should be ruled upon by this Court.

2. The decision of the Court of Appeals applying the rules of construction with respect to collective bargaining contracts, rather than those applicable to commercial contracts, in the determination whether disputes arising under the welfare agreements were arbitrable constitutes an erroneous extention of the principles of arbitrability established by this Court in *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* beyond the intent and purpose of that decision and should be reviewed by this Court.

3. The decision of the Court of Appeals that the requirements of Section 301 pertain only to venue, and not to subject matter jurisdiction, constitutes an important decision concerning the jurisdiction of federal courts and the administration of the federal labor laws which should be reviewed by this Court.

A. The Court of Appeals Exceeded the Guidelines of Arbitrability Established by This Court in United Steelworkers v. Warrior & Gulf Navigation Co.

In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), this Court held that the parties to a collective bargaining contract must submit to arbitration all disputes that they have agreed to arbitrate. The Court expressly recognized, however, that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" and that the question raised in all cases of arbitrability under Section 301 is whether the parties had agreed to arbitration, 363 U. S. at 582.

The contract involved in the *Warrior & Gulf* case contained a broad grievance and arbitration clause providing a procedure for the settlement of all differences between the parties "as to the meaning and application of the provisions of this Agreement . . . ." 363 U. S. at 576. It is conceded that there is no such broad arbitration clause in either of the welfare agreements out of which the instant disputes arise. On the contrary, the welfare agreements provide for the arbitration of only six narrowly restricted types of disputes all of which relate solely to the establishment of precisely determinable facts and not with the interpretation of the agreements. Moreover, with respect to these disputes, the agreements provide for several different grievance procedures, including the arbitration procedure of the collective bargaining contracts. None of the disputes or procedures, it is submitted, relate to the eligibility of striking, non-active employees for welfare benefits.

The courts below, in concluding that the instant disputes were arbitrable, rely on Paragraph 10.01 of Part V of the Republic Welfare Agreement and Paragraph III F. of Article III of the Conshohocken Welfare Agreement, which provide as follows:

REPUBLIC WELFARE AGREEMENT

"10.01 The Employer may enter into a contract or contracts with an insurance company or companies to provide the benefits described in these Parts III, IV and V and, upon so doing, the Employer shall be relieved of any individual liability to any Employee or any Beneficiary designated by such Employee other than to maintain such contract or contracts in force. In the event any dispute shall arise, as to whether the Employer has provided the insurance benefits hereinabove described, such dispute shall be subject to the grievance procedure of the General Agreement between the parties, including arbitration."

CONSHOHOCKEN WELFARE AGREEMENT

"F. The Company may, alone or in conjunction with other corporations subsidiary to or affiliated with the Company, enter into a contract or contracts with an insurance company or insurance companies to provide the insurance benefits described herein, and, upon so doing, the Company shall be relieved of any individual liability to any Employee or any beneficiary designated by such Employee other than to maintain such contract or contracts in force for the duration of this Agreement. The employer shall be liable for benefits described in this Insurance Program which are not provided in said insurance contracts. In the event any dispute shall arise based on the question whether the Company has provided the insurance benefits hereinabove described, such dispute shall be subject to the grievance procedure of the Working Agreement *then in effect,* including arbitration; omitting, however, all steps preceding presentation of grievance to the Personnel Department of the Company." (Emphasis added.)

It is clear that these provisions provide for arbitration only of the question whether the Company has provided the agreed benefits through an insurance company thereby protecting itself against liability. If, for example, the unions contended that Company was liable for any of the insurance benefits because it had failed to provide the benefits through insurance coverage, arbitration would be authorized under these clauses. The provisions *do not*, however, provide for the arbitration of any dispute relating to the eligibility of striking employees for the said insurance benefits to be provided under the welfare agreements.

The courts below, recognizing the deficiency in the express language of the welfare agreements and the limited nature of the arbitration provisions thereof, held that the mere reference to the grievance and arbitration clauses of the collective bargaining contracts in the welfare agreements with respect to the settlement of this one narrow issue relating to insurance benefits constituted, by inference and as a matter of law, an agreement to incorporate the entire broad scope of the arbitration provisions for the settlement of disputes relating to insurance benefits arising under the welfare agreements. This amounts to a rewriting of the welfare agreements and imposes an obligation on Company to arbitrate disputes which Company has not, by any stretch of the imagination, agreed to submit to arbitration, contrary to the clear mandate of this Court in *United Steelworkers v. Warrior & Gulf Navigation Co., supra.* If the intent of the parties was to submit all issues under the welfare agreements to arbitration, the normal and easiest thing would have been to provide, just like in the collective bargaining contracts, general arbitration clauses for all issues involved, which is clearly *not* the case.

The aberrance of the courts below from the guidelines established by this Court in the *Warrior & Gulf* case is

further demonstrated by its cavalier dismissal of the limitation in the above quoted arbitration clauses of the welfare agreements that the general labor agreements from which the arbitration procedure was to be derived be "then in effect." The very purpose of these words, inserted after long sessions of bargaining and at the request of Company, was specifically to protect Company from the undue consequences that could result in the administration of the welfare agreements in the event that the unions or the employees arbitrarily refused to enter into new collective bargaining contracts after the expiration of the old.

It was conceded that the general labor agreements between the parties had expired and at the time the grievances arose were not "then in effect." The Court of Appeals simply concluded that the reference to the labor agreements then in effect was "only for the purpose of incorporating the general arbitration procedure" of the labor agreements, and that "the continuing vitality of the entire collective bargaining agreement was not of consequence in this context." App. A-23. Thus, the Court created "an agreement to arbitrate that never was" and extended the life of its creation beyond the express time limitation established by the parties for the narrowly restricted issues which they did agree to arbitrate.

This approach goes far beyond this Court's advice in the *Warrior & Gulf* case to resolve all doubts in favor of coverage. It epitomizes the somnolent consideration which the federal courts are giving to cases involving questions of arbitrability. As soon as they see the word "arbitration" anywhere in a labor agreement of any type, they throw up their hands and take the easy path of ordering the case to arbitration. Unless this Court reviews the instant case which involves a flagrant disregard of the intention of the parties, parties to labor agreements all over

the nation may be required to arbitrate issues which they never agreed to submit to arbitration, contrary to the mandate of this Court. The effect can only be harmful to the concept of resolving industrial disputes through voluntary arbitration. Parties will be reluctant to agree to arbitrate any issues for fear they will be held to have agreed to arbitrate a broader range of issues. Accordingly, it is necessary and urgent that this Court grant review and affirm the principle set forth in *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* that a party may not be compelled to arbitrate an issue which it has not agreed to submit to arbitration.

B. The Principles of Arbitrability Established in United Steelworkers v. Warrior & Gulf Navigation Co. Are Not Applicable.

In determining whether the parties had agreed to arbitrate the issues herein arising under the separate, self-contained welfare agreements, the courts below relied on the rules of construction applicable to collective bargaining agreements set forth in this Court's decision in *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* rather than the general rules applicable to ordinary commercial contracts. The rule for commercial agreements is that the intention of the parties to submit their contractual disputes to final determination outside the courts must be made manifest by plain language before a party will be required to arbitrate a contractual dispute. *United States v. Moorman,* 338 U.S. 457, 462 (1950). In 1960, this Court created an exception to the general rule for collective bargaining agreements on the grounds that an agreement of this sort ". . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen can-

not wholly anticipate . . . . The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. at 578-79.

It is clear that the welfare agreements involved in this case are not "collective bargaining agreements" as that term is used in *United Steelworkers v. Warrior & Gulf Navigation Co., supra.* They are not generalized codes designed to cover a myriad of cases which the draftsmen cannot wholly anticipate. Even a casual perusal of the agreements that they are closely akin to commercial insurance policies which are intended to cover every eventuality. The parties recognized that the welfare agreements were of a different character than the collective bargaining agreements and executed them as separate, self-contained documents with a term extending beyond the life of the overall collective bargaining agreements in existence at the time they were executed.

Company was in the tire business, not the insurance business. Labor problems directly connected with the operation of the tire business were of vital concern to Company and involved matters which could only be dealt with by management. Company was willing, therefore, to agree to the grievance and arbitration provisions of the labor contracts in order to expedite the resolution of such problems and there is ample justification for broadly interpreting the scope of those provisions with respect to these problems.

The health and welfare benefits, however, were not involved in the day-to-day operations of Company and involved problems lying outside the expertise of management

personnel or of labor arbitrators. Accordingly, Company separated the welfare program from the overall collective bargaining agreements and adopted a much more limited grievance procedure for disputes arising under this program. Certainly, the same reasons do not exist for the broad application of this procedure as they do for the arbitration provisions of the collective bargaining contracts.

At the very least, the decision of the courts below in applying the broad rules of construction established in the *Warrior & Gulf* opinion for collective bargaining contracts to the instant welfare agreements constitutes a radical extension of that opinion beyond its original intent and purpose. The vital question of whether arbitration provisions in separate, self-contained welfare agreements should be construed under the rules set forth in *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* or under the rules set forth in *United States v. Moorman, supra,* should be resolved by this Court in view of the substantial number of such welfare agreements in existence and the different disposition of cases which will occur depending on which rules of construction are utilized. A final clarification of this point is of national importance in guiding management and labor organizations in the negotiation of future welfare agreements.

C. The District Court Did Not Have Subject Matter Jurisdiction of This Action Under Section 301.

This action was brought under Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185. Subsections (a) and (c) of this provision provide as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this

> chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."
>
> "(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

It is Company's contention that these provisions limit jurisdiction over the subject matter of this suit to district courts having jurisdiction over the parties, both plaintiffs and defendants, and for these purposes jurisdiction over a labor organization shall be only in those districts in which the organization maintains its principal office or is engaged in representing employee members. The District Court found that the local unions herein do not maintain their principal offices and are not engaged in representing employee members in the district in which this action was brought as required under Subsection 301(c). Nonetheless, the District Court concluded that Subsection 301(c) pertains merely to venue and that Company had waived its right to the defense of lack of venue by failing to raise the defense seasonably.

This may very well be true as far as it goes; this Court itself has recognized that Subsection 301(c) is a venue provision. *Denver & R. G. W. R. R. v. Brotherhood of Railroad Trainmen,* 387 U. S. 556, 562 (1967). See also *Dixie Car-*

riers, Inc. v. National Maritime Union, 35 F. R. D. 365 (S. D. Tex. 1964). The District Court's decision, however, totally ignores the language of Subsection 301(a) which expressly conditions the grant of subject matter jurisdiction to district courts having jurisdiction (or venue) over the parties. Prior to the enactment of Section 301, the federal courts had no federal question jurisdiction over disputes relating to labor contracts. It is now well settled that such jurisdiction was conferred on the federal courts by Subsection 301(a). The inclusion in this jurisdictional provision of the limitation with respect to the courts in which such actions can be brought, it is submitted, makes the applicable venue requirements, including those of Subsection 301(c), jurisdictional in nature.

There are strong policy arguments which support the conclusion that the requirements of Subsections 301(a) and (c) involve subject matter jurisdiction, as well as venue. The basic purpose of the Labor-Management Relations Act is to guarantee certain rights for employees, not for labor organizations or employers. These rights are directly involved in any action commenced by or against a labor union under Section 301. Congress evidently considered it important to the employees represented by the unions in such a case to have the matter heard in a forum in which the union has some contact and will have certain responsibility in properly asserting or defending the rights of the employees. Yet this protection is destroyed if Subsections 301(a) and (c) are treated as venue provisions only, because the employees, not being parties to the proceeding, would have no standing to raise the venue issue in order to have the case heard in a more convenient forum.

In all events, the question raised herein as to the meaning of Subsections 301(a) and (c), affecting as it does the

jurisdiction of the federal courts and the administration of the federal labor laws, is of great public importance and should be resolved by this Court.

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

EDWIN P. ROME,
M. KALMAN GITOMER,
GONCER M. KRESTAL,
RICHARD A. SEMARARO,
4 Penn Center Plaza,
Philadelphia, Pa. 19103,
Attorneys for Petitioner,
Lee Rubber & Tire Corporation.

BLANK, RUDENKO, KLAUS & ROME,
YAUCH & FAGAN,
Of Counsel.

APPENDIX A.

Opinion of the United States District Court for the District of New Jersey.

SHAW, *J.*

This action was brought by plaintiffs to compel defendant to submit certain grievances to arbitration.[1] Jurisdiction is alleged pursuant to § 301 of the Labor Management Relations Act, 29 U. S. C. 185 and 28 U. S. C. 1331 and 1337.[2] The matter is now before the Court on cross motions for summary judgment. It is submitted on stipulation of fact, briefs, proposed findings of fact and conclusions of law and the pleadings. The pertinent facts may be summarized as follows:

United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO Local 102 (Local 102) was a party to a collective bargaining agreement with defendant dated July 3, 1961 and expiring on June 30, 1963.[3] By virtue of the agreement Local 102 was the collective bargaining agent for employees of defendant at its plant in Youngstown, Ohio. The collective bargaining agreement included a provision for arbitration of grievances which, in pertinent part, reads as follows:

> (1) In the event that disputes or grievances, except those involving general or departmental wage increases or decrease, have not been adjusted to the satisfaction

1. By amended complaint plaintiffs seek as alternate relief in award of damages.

2. Federal diversity jurisdiction is also suggested by amendment of the original complaint. An unincorporated labor union is not a citizen of a State for purposes of federal diversity jurisdiction. *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U. S. 145 (1965).

3. Provision for yearly renewal in the absence of written notice by either party is not pertinent to any issue presented here.

of the parties as outlined elsewhere herein, then such unsettled grievances or disputes may be submitted to a board of arbitration in the following manner.

(2) The party so desiring arbitration shall, within 30 days of the date of the Company's final reply made under the grievance procedure, frame the question to be arbitrated, referring specifically to the provision to be interpreted, or the provision which has been allegedly misapplied wherever applicable, notify the other party in writing, and within five days the Union shall designate its representative and the Company shall designate its representative. These two shall mutually select the third member of the Board. In the event that the third member cannot be mutually agreed upon within ten days after filing of notice to arbitrate, then the two arbitrators shall jointly request the AMERICAN ARBITRATION ASSOCIATION, 9 Rockefeller Plaza, New York, N. Y., to appoint the Chairman of the Board of Arbitration.

* * *

(4) A majority decision of the Board shall be rendered within 10 days of the submission of all evidence and shall be final and binding upon both parties.

United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO Local 227 (Local 227) was a party to a collective bargaining agreement with defendant made on June 30, 1961 and expiring June 30, 1963. (As with the Local 102 agreement, the provisions for annual renewal notice are not pertinent to any issue here.) By virtue of the agreement, Local 227 was the collective bargaining agent for employees of defendant at its Conshohocken plant in Pennsylvania. This agreement also provided for arbitration of disputes, the pertinent language of which is quoted as follows:

In the event a complaint, grievance or dispute filed by either of the parties to this agreement remains unsettled * * *, either party may within two (2) weeks thereafter notify the other party in writing of its desire to submit the matter to a Board of Arbitration in the following manner:

Within five (5) working days from the receipt of such notice the parties will meet and have an understanding of the question or questions to be submitted for arbitration and each party shall, at such meeting, submit to the other party the name of its arbitrator. The two arbitrators so chosen shall within three (3) days jointly request the American Arbitration Association, Philadelphia, Pa., to appoint the Chairman of the Board of Arbitration. The Arbitration Board so selected shall fix a hearing date, meet and consider the complaint, and, if possible, render a decision within two (2) weeks after completing hearing, which decision shall be final and binding on all parties. The Arbitration Board may interpret this agreement and apply it to the particular case presented to it, but shall, however, have no authority to add to, or subtract from or modify the terms of this agreement.

On September 28, 1961 defendant and Local 102 entered into an agreement entitled "Employee Welfare Benefit Programs—Republic Rubber Division" effective during the period from July 1, 1961 to June 30, 1966. This agreement contained a provision that "In the event any dispute shall arise, as to whether the Employer has provided the insurance benefits hereinabove described, such dispute shall be subject to the grievance procedure of the General Agreement between the parties hereto, including arbitration."

Local 227 entered into an agreement with defendant entitled "Agreement for Pension, Service Award and In-

surance Benefits'' the term of which was for the period from July 1, 1961 to June 30, 1966. It also contained a provision for arbitration which reads as follows: ''In the event any dispute shall arise based on the question whether the Company has provided the insurance benefits hereinabove described, such dispute shall be subject to the grievance procedure of the Working Agreement *then in effect*, including arbitration; omitting, however, all steps preceding presentation of the grievance to the Personnel Department of the Company.'' (Emphasis supplied.)

After the collective bargaining agreements above mentioned expired on June 30, 1963, there was a strike at each of defendant's plants. During the time of the strike a dispute arose between defendant and plaintiffs as to defendant's obligations under the welfare agreements above mentioned.[4]

Defendant sent a letter to Local 102 on August 29, 1963 stating that as of September 30, 1963 it would discontinue payment of premiums to assure continued coverage for sickness and accident benefits and supplemental workmen's compensation benefits for which provision was made by Articles III, IV, and V of the Welfare Benefit Agreement.

On September 10, 1963 Local 102 presented the following grievance to the Personnel Department of defendant:

> The Union protests the action of the Company in refusing to provide the Accident and Sickness Benefits and the Supplemental Workmen's Compensation Benefits for its Employees as provided in Part V of the Employees Welfare Benefit Agreement dated September 28, 1961. The Union also protests the announced

4. The strike at the Republic Rubber Division plant was settled. The record does not indicate whether the strike at the Conshohocken plant was ever settled.

intention of the Company to terminate on September 30, 1963, the Life Insurance and Accidental Death and Dismemberment Insurance and the Hospital, Surgical and Medical Benefits for its Employees and their Dependents, as this coverage is provided in Parts III and IV respectively of the agreement. The Union requests the Company to provide the benefits for its Employees and their Dependents for the duration of this Employee Welfare Benefit Agreement.

It seems, according to the stipulation filed, that after a collective bargaining negotiation session between defendant and Local 227 held on July 30, 1963, defendant made known to Local 227 its views with respect to its obligations under the agreement for pension and insurance benefits and that as a consequence of what occurred then, Local 227 presented a grievance on August 21, 1963 in the following form:

Mr. J. J. Conway, Sr.
Personnel Director
Lee Rubber & Tire Corp.
Hector Street
Conshohocken, Penna.

Dear Mr. Conway:

In accordance with Article III, Section 3, paragraph F, of the Pension and Insurance agreement, the Union hereby submits a grievance; protesting the Company's failing to continue to provide life insurance coverage for its members. The Union requests that this grievance be processed through the established grievance procedure at the Personnel Department level, as provided for in the Pension and Insurance Agreement.

GRIEVANCE No. 209

The Union feels that the Company has failed to live up to the Pension & Insurance Agreement dated the 30th day of June 1961, in that the Company has informed the Union that life insurance coverage will not be provided for the members of the bargaining unit subsequent to July 31, 1963. (With the 31 day automatic extension, benefits are apparently to be provided until the last day of August, 1963.)

In accordance with Article III, Section 3, paragraph F, of the Pension & Insurance Agreement, the Union requests relief in the form of having the Company either provide this coverage through the medium of an insurance contract, or failing that, that the Company assume liability for any such benefits due to members of the bargaining unit.

The foregoing grievance or protest was reiterated by Local 227 on September 17, 1963 in the following language:

Dear Mr. Conway:

In accordance with Article III, Section III, paragraph F, of the Pension, Service Award and Insurance Benefits Agreement, dated June 30, 1961, the Union hereby submits a grievance; protesting the Company's termination of certain welfare benefits and its announced intention to terminate other welfare benefits on September 30, 1963.

The Union requests that this grievance be processed through the established grievance procedure at the Personnel Department level, as provided for in the Pension, Service Award and Insurance Benefits Agreement.

GRIEVANCE No. 259

The Union protests the action of the Company in refusing to provide the Accident and Sickness Benefits and the Supplemental Workmen's Compensation Benefits for its Employees as provided in Article III, Section I, paragraph D and Article IV respectively, of the Pension, Service Award and Insurance Benefits Agreement, dated June 30, 1961. The Union also protests the announced intention of the Company to terminate on September 30, 1963, the Hospital, Surgical and Medical Benefits for its Employees and their Dependents and the Life Insurance and Accidental Death and Dismemberment Insurance, as this coverage is provided in Article III, Section I, paragraphs A, B, and C and Article III, Section II respectively, of the Agreement.

The Union requests the Company to provide the benefits for its Employees and their Dependents for the duration of this Pension, Service Award and Insurance Benefits Agreement.

It is the position of defendant that the alleged grievances are not arbitrable and, moreover, that this Court does not have jurisdiction.[5] The questions raised will be discussed in inverse order.

Each of the plaintiffs is an unincorporated labor organization representing employees in an industry affecting commerce. So far as the record discloses, neither of the labor unions maintains a principal office in this district and none of their duly authorized officers or agents are engaged in representing or acting for employee members in this district. It would seem that the only reason why

5. Defendant contends that venue is improper and further that the Court does not have subject matter jurisdiction.

the action by both unions was brought in this district was to have the related matters presented in one court.

The argument of defendant as to jurisdiction is predicated upon interpretation of 29 U. S. C. 185(c) which reads as follows:

> For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Cases in which this section has been discussed have treated it as relating to venue and not subject matter jurisdiction. See *Dixie Carriers, Inc. v. National Maritime Union of America,* 35 F. R. D. 365 (S. D. Tex. 1964); Cf. *Colonial Hardwood Flooring Co. v. Furniture Workers of America,* 76 F. Supp. 493 (D. Md. 1948); *International Association of Machinists v. Smiley,* 76 F. Supp. 800 (E. D. Pa. 1948).

Counsel for defendant conceded that he has found no authority which construed subsection (c) as relating to subject matter jurisdiction. His argument as set forth in the transcript of hearing is predicated solely upon the use of the term "jurisdiction" instead of the term "venue". The argument is not persuasive because it does not seem logical, upon reading the Act, and, considering the purpose thereof, that Congress intended to create an intransient cause of action vesting sole subject matter jurisdiction in particular district courts to the exclusion of others in which a defendant does not challenge venue. Subsection (a) must be read together with subsection (c). Subsection (a) provides that

"Suits . . . *may be brought* in any district court of the United States *having jurisdiction of the parties.*" (Emphasis supplied.)

This is a transient cause of action in which the Court has subject matter jurisdiction. Venue may be challenged and the question presented is whether venue has been waived. Venue is a privilege which must be seasonally asserted. Failure to assert it constitutes a waiver. Once venue is waived, even by mistake of law, it may not be reasserted. See *Davis v. Smith,* 253 F. 2d 286 (3rd Cir. 1958). Rule 12(b) provides that the defense of improper venue must be raised in a responsive pleading or, at the option of the pleader, by motion made before responsive pleading. There may be circumstances where, by reason of fraudulent representations or misleading information furnished by a plaintiff, relaxation of the Rule would be justified. Such circumstances are not present here.

Paragraphs 1 of the First and Second Causes of Action asserted by the initial complaint filed December 12, 1963 allege jurisdiction generally. The Answer of defendant filed February 4, 1964 denies the allegations of jurisdiction making no specific reference to venue. Nor was the defense of improper venue made by motion before filing of Answer. The first pleading of defendant which specifically raises the issue is the Answer to the Second Amendment to the Complaint filed June 30, 1965 wherein defendant asserts by its First and Third Separate Defenses to All Counts:

> First Separate Defense to All Counts
>
> Plaintiffs and each of them have failed in their Complaint and Amendments to establish the jurisdiction of this Court over the persons and subject matter set forth in plaintiffs' Complaint as amended. This Court is without jurisdiction. Defendant pleads lack of jurisdiction of this Court.

SECOND SEPARATE DEFENSE TO ALL COUNTS

Plaintiffs and each of them have failed in any count of their Complaint or its Amendments to plead or establish facts which show that the venue of this Court is proper as required by applicable statutes and court rules. Defendant pleads the defense of improper venue.

There was no specific reference to the venue question in the Pretrial Order entered on October 7, 1964, pre-dating plaintiffs' final Amendment to the Complaint. In the Pretrial Order it was directed that counsel confer and prepare a stipulation of material facts which were not in dispute. The stipulation was filed on December 23, 1964. Paragraphs 12 and 26 of the stipulation referring respectively to the First and Second Causes of Action asserted by plaintiffs recite:

12. Defendant: (a) has refused to recognize the purported grievance dated September 10, 1963, (b) has refused to process the said purported grievance, (c) has taken the position that there is no agreed upon arbitration procedure applicable to said purported grievance, and (c) has stated that it is not willing to submit said purported grievance to arbitration.

26. Defendant: (a) has refused to recognize the purported grievance dated September 17, 1963, (b) has refused to process the said purported grievance, (c) has taken the position that there is no agreed upon arbitration procedure applicable to said purported grievance, and (d) has stated that it is not willing to submit said purported grievance to arbitration.

Defendant's trial brief, furnished to the Court on May 12, 1965, refers to the stipulation and submits by argument

nothing more than the substantive question of whether defendant should be compelled to submit to arbitration. The question of venue was discussed in supplementary briefs after filing by defendant of the Answer to Second Amendment to Complaint on June 30, 1965.

A challenge to venue cannot be made after the litigation has progressed beyond the initial required pleadings. A party cannot sit back and have the litigation processed up to the point of an imminent trial date and then raise the issue. Nor can a party accomplish delay in having the defense considered by *general* denials of jurisdiction. The defense of improper venue is an affirmative defense and should be specifically pleaded. Such serves the purpose of early and expeditious determination of whether the Court should proceed further with the action.

There is tacit admission in the arguments of defendant that it did not conceive the defense of improper venue until a late stage in the litigation. In defendant's trial brief on the question of jurisdiction, furnished to the Court on August 7, 1965, it is stated:

> *Neither the complaint nor any of its amendments contains an allegation that plaintiff unions maintain a principal office in New Jersey, or that officers or agents of plaintiff unions are engaged in representing or acting for employee members within the State of New Jersey.*

If this is intended to suggest that defendant was misled by insufficiency of allegations of the Complaint, the argument has no merit. The intimate relationship existing between defendant and plaintiffs and the nature of that relationship dispels any suggestion that defendant was not aware at inception of this litigation of the fact that neither

of plaintiffs had a principal office in the State of New Jersey or that there were no officers or agents engaged in acting for employee members in the State of New Jersey. The Court finds that defendant did, or with reasonable diligence would have had, sufficient knowledge of the location of the principal office of each defendant when this suit was commenced and of the places where its employees were being represented by union officers or agents so that it could have interposed a timely defense of improper venue. Its failure to do so constituted a waiver of that defense. It may be added that the Court does not agree with defendant's assertion that plaintiffs have the burden to establish proper venue as would be the case with respect to subject matter jurisdiction. Improper venue is an affirmative defense and the burden of proof rests upon the party asserting it.

The next question is whether the grievances filed by the unions are arbitrable. The rule is that parties to a labor agreement are bound to arbitrate grievances if they have agreed to do so. *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). In the absence of an agreement to arbitrate, arbitration cannot be compelled. *Atkinson v. Sinclair Refining*, 370 U. S. 238 (1962).

The welfare agreements in this case remained in effect after the general collective bargaining agreements expired. Each of the welfare agreements incorporated the arbitration agreements of the collective bargaining agreements by reference. "Where a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing." *Williston on Contracts*, 3rd Ed., Sec. 628, page 901. Defendant argues that since the collective bargaining agreements had expired, the provisions for arbitration incorporated by reference thereto in the welfare agreements had no further effect. This argument as to Local 102 is clearly without merit. There is,

however, some question as to the application of the arbitration provisions of the collective bargaining agreement with Local 227. This arises because of what would seem to be the qualifying language "then in effect." Literally construed, this would seem to indicate that it was the intent of the parties under the Local 227 welfare program that, after expiration of the collective bargaining agreement, the arbitration provision in the welfare agreement became ineffective. Considering the fact that it seems to have been the basic intent of the parties that disputes would be arbitrable during the life of the welfare agreement, it seems more logical to conclude that the phrase "then in effect" was intended to refer to the arbitration provisions of the last general agreement in effect between the parties. At least it may be said that such an interpretation is not untenable though it may be rejected by an arbitrator in the exercise of his expertise in interpreting the agreement to determine what was actually intended by the language used. See *Communication Workers of America v. Bell Laboratories,* 349 F. 2d 398 (3rd Cir. 1965).

The grievance as to eligibility of strikers to receive benefits is predicated upon an alleged anticipatory breach of the employer's duty to provide such benefits. In one sense it may be argued that the grievance was premature. But viewed from a practical standpoint, it is clear that after the benefits were actually denied, as is the case here, the grievance would be arbitrable and the Court finds little reason to deny arbitration merely because the union brought the grievance prior to the employer's termination of benefits.

The employer argues that the arbitration clauses do not encompass an arbitrable dispute over an obligation to fund the insurance benefits. But the welfare agreements

provide for *the benefits* and whether they are furnished by funding the same or by direct assumption of the obligation to furnish them goes only to the question of remedy which the arbitrator may fashion if it be found that the unions have a remedial grievance arising out of denial of an obligation to maintain the benefits while a strike was in progress. Nothing herein stated is to be construed as an opinion by this Court as to whether or not the grievances in question have merit or what the nature of the remedy should be if the arbitrator finds them to have merit. This Court merely finds that upon the face of the agreements there is evidence from which it may be determined that an abritrable issue exists and in so finding it resolves all doubt in favor of arbitration. This Court has no jurisdiction to determine whether a claimed grievance has merit. *United Steel Workers v. American Mfg. Co.*, 363 U. S. 564 (1960).

It may well be, as above indicated, that the arbitrator, in his interpretation of the agreements, might find that when a general collective bargaining agreement expired there was no further obligation on the part of the defendant during the time of the strike to either fund the benefits or to compensate for such loss of them, if any, which may have been suffered by the beneficiaries. It is the function of the arbitrator to determine what the defendant was required to do under the agreements in question. *J. W. Wiley v. Livingston,* 376 U. S. 543 (1964). The function of this Court is confined strictly to consideration of the question of whether there is likelihood, on the face of the agreements, that the particular disputes in question may have been intended as disputes to be settled by arbitration. The Court resolves this question with a finding of arbitrability.

An appropriate order for entry of judgment consistent herewith will be submitted forthwith.

Judgment.

This action came on for hearing before the Court, Hon. Robert Shaw, District Judge, presiding, and the Court having heard and duly considered the crossmotions for summary judgment and the pleadings, stipulation and briefs in this matter and having filed its Opinion thereon,

It is ORDERED and ADJUDGED that:

1. The motion of the defendant for summary judgment be and it is hereby denied.

2. The motion of the plaintiffs for summary judgment on the First and Second Causes of Action be and the same is hereby granted.

3(a) The grievance dated September 10, 1963 presented by plaintiff Local 102 to defendant and set forth in the Complaint in Paragraph 9 of the First Cause of Action is one which said plaintiff is entitled to have submitted to arbitration under and in accordance with the provisions of the agreement between defendant and plaintiff Local 102 entitled "Employee Welfare Benefit Programs—Republic Rubber Division", as amended, incorporating by reference the grievance and arbitration provisions of the collective bargaining agreement between the said parties dated July 3, 1961.

(b) The defendant and plaintiff Local 102 are each hereby ordered and directed that within fourteen (14) days from the date hereof each shall designate its representative in accordance with the grievance and arbitration provisions hereinabove referred to, and each party shall notify the other party of the designation and name and address of its representative within the period aforesaid by written notice addressed to the other party's attorneys of record in this action, which notice may be given by the party's attorneys

of record in this action. The said two representatives shall mutually select the third member of the Board; and in the event that the third member cannot be mutually agreed upon within ten days after the expiration of the aforesaid period for the appointment of representatives then the two (2) arbitrators (representatives aforesaid) shall jointly request the American Arbitration Association, New York City, New York to appoint the Chairman of the Board of Arbitration.

4(a) The grievance dated September 17, 1963 presented by plaintiff Local 227 to defendant and set forth in the Complaint in Paragraph 9 of the Second Cause of Action is one which said plaintiff is entitled to have submitted to arbitration in accordance with the provisions of the agreement between defendant and plaintiff Local 227 known as the "Insurance Benefits Agreement" incorporating by reference the grievance and arbitration provisions of the collective bargaining agreement between the said parties dated June 30, 1961.

(b) The defendant and plaintiff Local 227 are each hereby ordered and directed that within fourteen (14) days from the date hereof each shall designate its representative in accordance with the appropriate provisions of the grievance and arbitration provisions herein referred to and each party aforesaid shall notify the other party of the designation and name and address of its representative within the period aforesaid by written notice addressed to the other party's attorneys of record in this action, which notice may be given by the party's attorney of record in this action. Within three (3) days after the expiration of said period the two (2) arbitrators (representatives aforesaid) shall jointly request the American Arbitration Association, Philadelphia, Pennsylvania to appoint the Chairman of the Board of Arbitration.

5. In the event any party fails to designate its arbitrator within the period above provided or to notify the adverse party of such designation as above provided or any representative fails to act within the time above provided then either party may apply to the Court for further appropriate relief at the foot of this judgment, the Court reserving jurisdiction for that purpose.

6. The Third and Fourth Causes of Action be and they hereby are dismissed.

All without costs.

Dated: 8/17/67

/s/ ROBERT SHAW, *D. C. J.*

Order Granting Stay of Judgment Pending Appeal.

On motion of Yauch & Fagan, Esqs., counsel for the defendant herein;

It is ORDERED that the Judgment here be stayed and the same is hereby stayed and suspended pending the appeal, which defendant desires to take from the Judgment of this Court, provided that Notice of Appeal is filed forthwith.

Dated: August 23, 1967

/s/ ROBERT SHAW,
U. S. D. C.

APPENDIX B.

Opinion of the United States Court of Appeals For the Third Circuit.

Before HASTIE, *Chief Judge,* and SEITZ and VAN DUSEN, *Circuit Judges.*

By SEITZ, *Circuit Judge.*

Two Unions ("plaintiffs") brought an action in the district court under § 301 of the Labor-Management Relations Act [1] to compel the defendant-Corporation to submit certain grievances to arbitration. Thereafter, the district court granted plaintiffs a summary judgment compelling defendant to arbitrate. United Rubber v. Lee Rubber, 269 F. Supp. 708 (D. C. N. J. 1967). This appeal followed. We turn to the undisputed facts of record.

One of the Unions ("Local 102") was a party to a collective bargaining agreement with defendant covering the Youngstown, Ohio plant. This agreement was the period from May 1, 1961, to June 30, 1963. It contained, inter alia, a general arbitration clause. On September 28, 1961, defendant and Local 102 entered into a separate agreement for the Youngstown plant entitled "Employee Welfare Benefit Programs—Republic Rubber Division" ("Welfare Agreement"). This agreement was effective during the period from July 1, 1961, to June 30, 1966.

The other plaintiff-union ("Local 227") was a party to a collective bargaining agreement with defendant covering its Conshohocken, Pennsylvania plant. It was dated June

1 29 U. S. C. § 185 and 28 U. S. C. § 1331 and 1337.

30, 1961, and expired June 30, 1963. This agreement contained an arbitration provision which, for our purposes, is the same as that executed for the Youngstown plant. Local 227 also entered into a separate agreement with defendant entitled "Agreement for Pension Service Award and Insurance Benefits" ("Welfare Agreement") for the period July 1, 1961, to June 30, 1966.

After the collective bargaining agreements expired on June 30, 1963, a strike ensued at both plants. Concommitantly a dispute arose between defendant and plaintiffs as to defendant's obligations under the Welfare Agreements. The plaintiffs were advised by defendant that as of September 30, 1963, it would discontinue payment of premiums to assure continued coverage for life insurance, sickness and accident benefits and supplemental workmen's compensation benefits for which provision was made under certain articles of their Welfare Agreements. Thereafter, Locals 102 and 227 challenged defendant's right to terminate such payments by invoking the arbitration provisions of their Welfare Agreements. This action followed, presumably because defendant did not agree with plaintiffs' right to arbitration.

In the district court the defendant challenged the court's jurisdiction as well as the arbitrability of the grievances. The court below held that it had jurisdiction and that there was a likelihood, on the face of the agreements, that the particular disputes may have been intended to be settled by arbitration. Defendant raises the same issues on appeal.

Turning first to the jurisdictional argument, the defendant contends that 29 U. S. C. § 185(c), dealing with actions and proceedings by or against labor organizations in the district court, prevented the district court from entertaining this action. That section provides:

"For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

Defendant's jurisdictional contention is that this action was not filed in a district where such an action is permitted to be brought under 29 U. S. C. § 185(c), it being agreed that neither factual situation mentioned in the statute was met. Defendant emphasizes the use of the world "jurisdiction" in the statute. But we agree with the district court that, considering the subject matter, Congress was actually referring to venue rather than jurisdiction. See Dixie Carriers, Inc. v. National Maritime Union of Amer., 35 F. R. D. 365 (S. D. Tex. 1964). We think the district court had subject matter jurisdiction and agree further with the court below that the venue challenge was not seasonably raised, as required, and therefore could not be deemed to be a defense to this action.

We next consider whether the assumed grievances were subject to the arbitration provisions of the Welfare Agreements.

It is clear of course that when these particular grievances arose, the Welfare Agreements were still in effect. Local 102 contends that Part V, Section 1, 10.01 of its Welfare Agreement settles the arbitrability issue. It is one of the "Miscellaneous Provisions," and provides:

"10.01. The Employer may enter into a contract or contracts with an insurance company or companies to provide the benefits described in these Parts III, IV

> and V [those in question] and, upon so doing, the Employer shall be relieved of any individual liability to any Employee or any Beneficiary designated by such Employee other than to maintain such contract or contracts in force. In the event any dispute shall arise, as to whether the Employer has provided the insurance benefits hereinabove described, such dispute shall be subject to the grievance procedure of the General Agreement between the parties hereto, including arbitration."

The Welfare Agreement defines "General Agreement" as follows:

> "The 'General Agreement' means the collective bargaining agreement dated May 1, 1961, between the Company and the Union as may be amended or supplemented or any new agreement."

The defendant contends that the quoted language of the Welfare Agreement does not incorporate the arbitration procedure set forth in the General Agreement. It contends that arbitration is intended only when the question is whether or not the Company has provided the agreed benefits through an insurance company thereby protecting itself against individual liability. Plaintiff says that defendant agreed to provide certain insurance benefits and now is seeking to avoid its obligation. Thus the issue ultimately to be resolved is whether defendant was required to continue to make any or all of the particular benefits available during the strike. We think it may fairly be inferred from the language of the arbitration provision that the parties intended this matter to be covered by such provision.

Nor can we see any merit to defendant's contention that, in any event, the district court committed error in holding that, by reference, the parties incorporated the arbitration clause of the collective bargaining agreement

into the Welfare Agreement. The Company says that, at most, it merely incorporated the arbitration machinery to resolve particular questions. From this premise it says that there was no intention to incorporate the broad scope of the grievance and arbitration clauses of the General Agreement. We think the limitation which defendant suggests is not fairly found in the language employed in the agreements.

Defendant next argues that the parties specifically excluded from arbitration the issues which the union seeks to arbitrate. Defendant bases its position on a series of contentions which ignore the broad language of the arbitration reference in the Welfare Agreement. In such a case any doubt must be resolved in favor of arbitration. See Steel Workers v. Warrior & Gulf Co., 363 U. S. 574 (1960).

Finally, defendant contends that the agreement to arbitrate was conditioned on a requirement that a collective bargaining agreement be in existence.

Clearly the collective bargaining agreement (General Agreement) had expired before these grievances arose. As to Local 102 we think it clear that reference to the General Agreement was made for the purpose of incorporating its arbitration procedure. The right to arbitrate was given by the Welfare Agreement itself. Moreover, although both agreements were executed about the same time, the Welfare Agreement was for a much longer period. We think it would attribute a "strange" intention to the parties to say that in such a case the right to demand arbitration with respect to the Welfare Agreement during its term was dependent upon the existence of an operative bargaining agreement.

We think the conclusions reached with respect to defendant's Welfare Agreement with Local 102 are equally applicable to the Local 227 Welfare Agreement. We do note that the latter agreement does provide as follows:

> "In the event any dispute shall arise based on the question whether the Company has provided the insurance benefits hereinabove described, such dispute shall be subject to the grievance procedure of the Working Agreement then in effect, including arbitration; omitting, however, all steps preceding presentation of the grievance to the Personnel Department of the Company."

The defendant points to the words "then in effect" and argues that the language evidences an intent to have the arbitration provision applicable only so long as the Working Agreement (collective bargaining agreement) was in effect. Again, we note that these rights are established by the Welfare Agreement and the reference to the Working Agreement was only for purpose of incorporating the general arbitration procedure. The continuing vitality of the entire collective bargaining agreement was not of consequence in this context.

The judgment of the district court is affirmed.

SUPREME COURT, U. S.

JUL 10 1968

JOHN F. DAVIS, CLERK

No. 202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

LEE RUBBER & TIRE CORPORATION,

Petitioner,

v.

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 102, AN UNINCORPORATED ASSOCIATION, and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 227, AN UNINCORPORATED ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

SAMUEL L. ROTHBARD,
ABRAHAM L. FRIEDMAN,
ROTHBARD, HARRIS & OXFELD,
744 Broad Street,
Newark, New Jersey, 07102,
Attorneys for Respondents.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT:	
I	9
II	11
III	13
CONCLUSION	15

Cases Cited

Burnrite Coal Briquette Company v. Riggs, 274 U. S. 208 (1927)	14
Commercial Casualty Co., Inc. v. Consolidated Stone Co., 278 U. S. 117 (1929)	14
Denver & R. G. R.R. v. Brotherhood of R.R. Trainmen, 387 U. S. 556 (1967)	13
Drake Bakeries v. Local 50, American Bakery, etc. Workers, 370 U. S. 524 (1962)	2
Industrial Additional Association v. Commissioner of Internal Revenue, 323 U. S. 310 (1945)	14
International Association of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N. Y. S. 2d 317, aff'd, 297 N. Y. 519, 74 N. E. 2d 467	11
NLRB v. Jacobs Mfg. Co., 196 F. 2d 680 (2 Cir. 1952)	12

PAGE

Panama R.R. Co. v. Johnson, 364 U. S. 375 (1925)... 13

Republic Steel Corp. v. Maddox, 379 U. S. 650 (1965) 2

Retail Clerks Int'l Assn. v. Lion Dry Goods, Inc., 369 U. S. 17 (1962)..... 11

Textile Workers v. Lincoln Mills, 353 U. S. 448 (1957) 14

United Steelworkers of America v. American Manufacturing Co., 363 U. S. 564 (1960).....2, 10, 11

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U. S. 593 (1960)..... 2, 10

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U. S. 574 (1960).....2, 10-12

Statute Cited

National Labor Relations Act..... 12

Rule Cited

F. R. Cv. P.:

12(b)(3) 13

Texts Cited

Taft-Hartley Act:

Sec. 301 ..... 7, 14

Sec. 301(c) 1, 13

28 U.S.C.:

Sec. 1391(c) 14

Sec. 1406(b) 13

29 U.S.C.:

Sec. 185 ..... 7, 14

Sec. 185(a) 11

Sec. 185(c) 8

Questions Presented for Review

1. Whether grievances challenging the right of the Company to terminate during a lawful strike all welfare benefits provided for in two unexpired welfare agreements came within the arbitration provisions in said welfare agreements incorporating by reference the arbitration provisions in the working agreements?

2. Whether Section 301(c) of the Taft-Hartley Act prescribes jurisdiction or merely venue?

3. Whether the division of negotiated terms and conditions governing wages, hours and other conditions of employment negotiated between a union and an employer into two separate agreements (a working agreement and a welfare agreement) converts the provisions in the welfare agreement into a "commercial" document and removes from the grievances and arbitration provision therein the favorable rule applicable to collective bargaining agreements?

Counter-Statement of the Case

In this case the courts below declared that certain grievances filed by Respondents Unions with Petitioner Employer were arbitrable and commanded the Respondents to participate in the selection of the 3-member Board of Arbitration, as provided in the applicable agreement.

Thus, the Petitioner is asking this Court to reconsider and reverse or modify the very principles which were decided by this Court in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *Drake Bakeries* v. *Local 50, American Bakery, etc. Workers,* 370 U. S. 524 (1962), and *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650 (1965), and a host of cases wherein this Court simply denied *certiorari.*

The controlling facts can be stated simply. For many years Petitioner (hereinafter called "the Company") operated two plants, one in Youngstown, Ohio, and the other in Conshohocken, Pennsylvania, wherein its employees were represented by sister Locals of the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, Local 102 being at Youngstown and Local 227 being at Conshohocken. (Stip. R. 25, R. 27).[1]

At each plant the terms negotiated were put into 2 documents, one a "Working Agreement", the other a "Welfare Agreement". These having expired, new contracts

---

[1] All references to "R" are to the Record consisting of Appellant's printed Appendix in the Court of Appeals; all references to "A" are to the Appendix to the Petition for Writ of Certiorari in this case consisting of the opinions of both lower courts. All emphasis is counsel's, except where otherwise indicated.

were signed at both plants; at Youngstown the new working agreement was signed July 3, 1961 and was for two years and the new welfare agreement was effective as of July 1, 1961 and was for five years (R. 26); similarly, at Conshohocken the working agreement was dated June 30, 1961 and was for two years and the welfare agreement was effective the next day and was for five years (R. 27, R. 28).

Each working agreement contained the customary provisions for recognition, wages, hours, seniority, grievance and arbitration, no-strike, etc. Each welfare agreement contained a series of subdivisions numbered as "Articles", each dealing with a particular variety of welfare benefit, all being contained in a single document with one set of signatures at the end thereof. Each article or group of articles contained a grievance and arbitration provision broad enough to cover the questions arising under that type of welfare benefit and each incorporated by reference the arbitration procedure of the working agreement.

At Conshohocken the welfare agreement (Ex. 7 to Stip., R. 105 and 110) contained provisions dealing with the following benefits:

Article I—Pension Plan (R. 110)—not involved herein. General Arbitration clause set out in Article I, Sec. VI, par. 1 at R. 130-131.

Article II—Service Award and Special Distributions on Discontinuance of Operations (R. 134)—not involved herein. General arbitration clause set out in Article II, Sec. II, par. 1 at R. 135.

Article III—Insurance Program (R. 139)—The crux of this case—contains the following subdivisions:

> Section I. Hospitalization, Surgical-Medical and Health and Accident (R. 139).

Section II. Group Life Insurance and Non-Occupational Accidental Death and Dismemberment Insurance (R. 150).

Section III. General Provisions (153a). General arbitration clause for Art. III set out in Article III, Section III, par. F at R. 154.

Article IV—Supplemental Workmen's Compensation Benefits (R. 155). General arbitration clause set out in Article IV, Sec. G at R. 157.

Article V—Duration and Termination (R. 158), including a no-strike provision.

Article III of the Conshohocken Welfare Agreement is clearly entitled "Insurance Program" (R. 139, 2 places); and in subpart I, Hospitalization, etc., states: "Benefits will be provided by the *Company* and without costs to Employees * * *". (R. 139). Under "Sickness and Accident Benefits" the Welfare Agreement provides that "Employees who become disabled shall notify the *Employing Company's Insurance Department*" (R. 145). Under "General Provisions" for subpart III, the Company is given the *option* to take out insurance policies; but will remain "liable for benefits described in this Insurance Program which are not provided in said insurance contracts"[2] (R. 154). And, finally, "In the event any dispute shall arise based on the question whether the company has provided the insurance *benefits* hereinabove described, such dispute shall be subject to the grievance procedures of the Working Agreement * * * including arbitration".

---

[2] The Petitioner in its brief as appellant in the Court of Appeals (at p. 25) conceded that this sentence states what is "clearly implied" in the other Welfare Agreement, where it is not expressly stated.

And the Working Agreement at Conshohocken clearly stated that "In the event a complaint, grievance or dispute *filed by either of the parties* to this agreement remains unsettled * * * either party may * * * thereafter notify the other party in writing of its desire to submit the matter to a Board of Arbitration * * * [whose] decision shall be final and binding on all parties." (R. 100 f), with the only exception there specified being that a "question of a general or plantwide wage adjustment cannot be submitted to a Board of Arbitration for settlement" (R. 101), and in the Welfare Agreement there are special provisions under the Pension Plan for physicians to determine with finality the question of permanent disability (R. 131).

The Respondents (Unions) believe that the authority of an Arbitrator to decide "whether the Company has provided the insurance *benefits*" clearly includes issues as to the duration of the obligation, conditions affecting the duration of the obligation, as well as many others and clearly including the issues which arose from the Company's letters announcing its termination of the benefits under the welfare agreements which still had 3 years to run. The Court of Appeals stated this, although in other words, saying:

> "Thus the issue ultimately to be resolved is whether defendant was required to continue to make any or all of the particular benefits available during a strike. We think it may fairly be inferred from the language of the arbitration provision that the parties intended this matter to be covered by such [arbitration] provision." (A. 21).

The welfare agreement at Youngstown had similar provisions (Ex. 2 to Stip., R. 37 & 43).

At each plant the working agreement expired June 30, 1963, while each welfare agreement still had three years to run; the parties knew of the different lengths of the terms and provided special conditions in anticipation thereof (R. 87 f; R. 158 f). At each plant following lengthy unsuccessful negotiations and the expiration of the working agreement there was a strike.

At Conshohocken, the Company during negotiations by letter informed Local 227 that it was not going to keep any of the benefits under the Welfare Agreement in force (R. 167), and advised (R. 169) that "if the Union and/or the striking employees would pay the respective premium by making such payments to the Company which would in turn pay them to the insurance company" the benefits could be kept in force.

Local 227 then sent the Company its Grievance No. 259 protesting the Company's announced intention to terminate the benefits (R. 173). The Company by letter rejected this grievance (R. 176). The International Union sent the Company 15 monthly payments totalling $56,806.20 (R. 107, R. 198) to keep the insurance in force. The strike there was never settled with the Company.

At Youngstown there were similar letters by the Company to the Union stating the Company was terminating all benefits under the welfare agreement and similar grievance filed by the Union and rejected by the Company. At Youngstown the Union sent two payments totalling $17,884.48; negotiations were successful and a new working agreement was signed, effective November 1, 1963. The strike there then ended and the employees returned to work.

In 1956 the Company had applied for and was granted authority to do business in the State of New Jersey; it

withdrew from New Jersey in 1964, 9 months after this suit was begun (R. 199). The Unions started this suit on December 12, 1963, pleading jurisdiction under Section 301 of the Taft-Hartley Act (29 U.S.C. §185); the Company answered and simply denied this allegation.

The thrust of the Complaint was that each Welfare Agreement required the Union appointed member of the 3-member Board of Arbitrations and the Company appointed member to "jointly request the American Arbitration Association to appoint the Chairman of the Board of Arbitrators", and that the Company had violated the Agreements by refusing to process the grievances and refusing to participate in the selection of the Board of Arbitrators (R. 9 & 14); and the relief sought was that the Court declare (1) that the grievances were arbitrable, (2) that the Company breached its agreements by refusing to recognize said grievances and process them in accordance with the agreements, etc.

The parties entered into an extensive Stipulation of Material Facts (R. 25) and an Appendix of 14 exhibits (R. 31 to 199). When the case came before the District Judge on cross motions for summary judgment, the Court entered an order for a further amendment to the Complaint and pursuant thereto the Unions added a Third and Fourth cause of action seeking alternative relief by way of damages if arbitration was not compelled (R. 184); the Company pleaded not only to the new Third and Fourth Causes of Action, but purported to also plead to "all counts" raising for the first time questions of venue and jurisdiction (R. 189); this new answer raising the question of venue was filed 17 months after the original answer not raising such question (R. 2). The Unions moved to limit the new pleading to the Third and Fourth causes of action (R. 192).

The District Court heard oral argument supplementing the Stipulation, Exhibits, Affidavit and many briefs. On June 19, 1967 the District Court Judge filed his opinion (R. 200) in favor of the Unions, finding that 29 U.S.C. §185 (c) relates to venue and not to subject matter jurisdiction; that objection to venue could be waived and was waived when the Company filed its original answer making no specific reference to venue either in the answer or by motion before answering. The Court's opinion states that "there is tacit admission in the arguments of Defendant that it did not conceive the defense of improper venue until a late stage in the litigation" (R. 210). The Court concluded that the failure of the Company to interpose a timely defense of improper venue was a waiver of that defense (R. 211).

Turning to the main question of whether the Unions' grievances were arbitrable (R. 211) the Court found that "the welfare agreements provide *for the benefit*" and that upon the face of the agreements there was evidence from which it might be determined that an arbitrable issue existed and, in so finding, the Court resolved all doubt in favor of arbitration (R. 213).

Judgment was entered denying the Company's motion for summary judgment and granting the Unions' motion for summary judgment on the First and Second Causes of Action and directing arbitration of the grievances set forth in the Complaint (R. 215).

The Company appealed to the Court of Appeals for the Third Circuit. That Court (A. 18), affirmed the judgment of the District Court, holding, *inter alia*, (1) that the word "jurisdiction" as used in 29 U.S.C. §185 (c) refers to venue rather than to jurisdiction; that the District Court had subject matter jurisdiction and that the venue challenge was not seasonably raised, as required, and there-

fore could not be deemed to be a defense to the action; (2) that the issue ultimately to be resolved was whether the Company was required to continue to make any or all of the particular benefits in dispute available during the strike and that it could "fairly be inferred from the language of the arbitration provision that the parties intended this matter to be covered by such provision"; (3) that the limitation which the Company suggests regarding arbitration "is not fairly found in the language employed in the agreements"; (4) that the contention of the Company that the parties specifically excluded from arbitration the issue which the Union seeks to arbitrate was wrong; (5) that the agreement to arbitrate the dispute under the welfare agreement was not conditioned on a requirement that the working agreement then be in existence; and (6) that the conclusions reached with respect to Local 102 were equally applicable to Local 227's agreements.

ARGUMENT

I.

The only important question which the Petitioner (Company) asks this Court to review by Writ of *Certiorari* (Pet. 11) is whether the Company is required to settle by arbitration the dispute over its obligations as to certain welfare benefits under the Welfare Agreement with each local union. The decisions of this Court are cited above at the beginning of the Counter-Statement of the Case.

The basic dispute between the parties is whether the Company was obligated to provide the various insurance benefits for the duration of the Welfare Agreements (5 years). But this is a dispute which an arbitrator must resolve, and is not the question which was before the lower Courts—whether under the arbitration provisions

of the collective bargaining agreement (meaning thereby the welfare agreements *and* the working agreements) the Company was obligated to submit the dispute to arbitration.

In granting summary judgment the Courts below did no more than heed the admonition of this Court in the three *United Steelworkers* cases, *supra,* that the Court should not attempt to resolve the merits of industrial grievances under the guise of determining whether they are arbitrable. As this Court said in *Warrior & Gulf,* "The Court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator." 363 U. S. at 585.

By the Welfare Agreement at Conshohocken, for example, the Company obligated itself to provide certain *benefits* (R. 139 ff) (for which it could, at its *option,* buy insurance coverage (R. 154) and then provided that

> "In the event any dispute shall arise based on the question whether the Company has provided the insurance *benefits* hereinabove described, such dispute shall be subject to the grievance procedure of the Working Agreement * * * including arbitration * * *." (R. 154 f).

The District Judge concluded that "the Welfare Agreements provide for *the benefits* (emphasis Court's) and whether they are furnished by funding the same or by direct assumption of the obligation to furnish them" went only to the remedy and that such disputes were arbitrable (A. 13-14). The Court of Appeals agreed. We submit this Court should not review their rulings.

II.

The argument by the Petitioner (Pet. 15) that all or some of the various parts of the welfare agreements should be treated as "commercial or insurance agreements" and not as collective bargaining agreements, is an attempt to slip the discredited doctrine of *International Association of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N. Y. S. 2d 317, affd. 297 N. Y. 519, 74 N. E. 2d 467 under the door closed by this Court in *United Steelworkers of America* v. *American Manufacturing Company*, 363 U. S. at 567.

The Unions and Company negotiated the working agreements and welfare agreements obviously as a package at each plant; surely what was yielded in one agreement financially was carefully considered by the parties in deciding what went into the other agreement; merely because the provisions are collected into two separate documents, one running for two years and the other for five years, bearing in mind that the parties contemplated a continuing relationship, does not convert the welfare agreement from being a collective bargaining agreement into something else—or, more accurately in the words of the Statute—into something other than "contracts between an employer and a labor organization representing employees in an industry affecting commerce" (29 U.S.C. 185(a)). *Retail Clerks Int'l Assn.* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962).

As this Court emphasized in *Warrior & Gulf, supra*, arbitration in commercial cases is the substitute for litigation, whereas arbitration of labor disputes under a contract between employer and a labor organization is a substitute for industrial strike and is "part and parcel of the collective bargaining process itself" (363 U. S. at 578). Here the Company was very careful to insinuate into each

welfare agreement no-strike provisions similar to those in the working agreements (R. 87 & 159). Each welfare agreement contained a pension plan which expressly provided that disputes between any employee as to eligibility for, or amount of payment of, pension benefits may be taken up as a grievance under the working agreement and thence to arbitration *with the Company!* (R. 62). Is the Company entitled to have only the pension part of the welfare agreement treated as a collective bargaining agreement and the other parts treated as commercial insurance? Surely not. The same arguments and conclusions apply to the obligation to pay Service Awards (R. 64).

Finally, and perhaps conclusively, the Company obtained the insertion in each Welfare Agreement of a provision reading:

> "This Agreement constitutes a settlement for the duration of this Agreement of all issues with respect to the subject matter covered hereby, and, while this Agreement continues in effect, the Company shall have no obligation to negotiate or bargain with the Union with respect to any subject matter covered hereby, nor shall there be any strike or work stoppage with respect to such matters." (R. 159 & 87).

Such a provision is only understandable if the document is a collective bargaining contract since its purpose is to relieve the Company of the need to bargain collectively as required by the National Labor Relations Act. *NLRB* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 684 (2 Cir. 1952).

Clearly, the Welfare Agreements are "part and parcel of the collective bargaining process itself"; *Warrior & Gulf*, 363 U. S. at 578; and the rules regarding arbitration enunciated in the triology apply, and not those relating to commercial arbitration.

III.

The Company urges as its last point that the District Court did not have subject matter jurisdiction of this action under Section 301 (Pet. 17). In support, the Company urges the interpretation that Section 301 (c) limits jurisdiction over the subject matter of this suit to the District Court having jurisdiction over *both plaintiffs and defendants.*

As this Court recognized in *Panama R. R. Co.* v. *Johnson,* 364 U. S. 375 (1925), Congress frequently inaptly uses the word "jurisdiction" when it really means "venue."

The District Court and the Court of Appeals both held that the provision in question related merely to venue and that the Company had waived its right to assert the defense of lack of venue by failing to raise the defense seasonably. The Petition (p. 18) even admits that this Court has recognized that 301(c) is a venue provision. *Denver & R. G. R.R.* v. *Brotherhood of R.R. Trainmen,* 387 U. S. 556, 562 (1967).

Both Courts below found that the Company had waived its right to object to venue by not raising the question of venue until 18 months after service of the Complaint. This is in accord with F. R. Civ. P., Rule 12(b)(3) and 28 U.S.C. Sec. 1406(b), the latter reading:

> "Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."

Of course Plaintiff, having started the action, had thereby waived any right on its part to object to the venue, and a defendant has no right to object to the venue as to

any other party, whether plaintiff or defendant. *Burnrite Coal Briquette Company* v. *Riggs,* 274 U. S. 208, 211-2 (1927); *Commercial Casualty Co., Inc.* v. *Consolidated Stone Co.,* 278 U. S. 117 (1929); and *Industrial Additional Association* v. *Commissioner of Internal Revenue,* 323 U. S. 310 (1945).

Subject matter jurisdiction was granted *every* U. S. district court by Section 301 of the Taft-Hartley Act, 29 U.S.C. Sec. 185. *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448 (1957). In addition, 28 U.S.C., Section 1391 (c) provides:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

The lower courts could have found, if it had been necessary, in accord with 28 U.S.C. §1391(c), that the District Court had proper venue because the Company had applied for and been granted authorization to do business in New Jersey and had designated an agent in New Jersey upon whom process could be served and that this agent was the one upon whom the Summons and Complaint in this case had been served.

For either reason the argument in the Petition is without merit.

CONCLUSION

It is respectfully submitted that for the reasons hereinabove set forth, the Petition for Certiorari should be denied.

Respectfully submitted,

SAMUEL L. ROTHBARD,
ABRAHAM L. FRIEDMAN,
ROTHBARD, HARRIS & OXFELD,
744 Broad Street,
Newark, New Jersey 07102,
Attorneys for Respondents.